IN THE

Supreme Court of the United States

October Term, 1977

No. 77-753

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,
Petitioner,

v.

John Daniel,
Respondent.

No. 77-754

Local 705, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and Louis F. Peick,
Petitioners,

v.

John Daniel,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF FOR THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* AND BRIEF

William B. Spann, Jr.
1155 East 60th Street
Chicago, Illinois 60637
President, American Bar Association

Frank Cummings
Jeffrey Newman
Marshall, Bratter, Greene, Allison & Tucker
1140 Connecticut Avenue, N.W.
Washington, D.C. 20036
and
430 Park Avenue
New York, New York 10022
Attorneys for Amicus Curiae, American Bar Association

Of Counsel:
Jay S. Siegel
60 Washington Street
Hartford, Connecticut 06106
Chairman, Section of Labor Relations Law

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INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner,

v.

JOHN DANIEL,
Respondent.

No. 77-754

LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AND LOUIS F. PEICK,
Petitioners,

v.

JOHN DANIEL,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF FOR THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE*

The American Bar Association moves for leave to file the attached brief *amicus curiae* in the above-entitled cases. This leave is requested on the ground that the Association is in a position to assist the Court with respect to the issue

presented: whether pensions negotiated within the framework of collective bargaining are subject to the federal statutes regulating securities.

Pursuant to Rule 42(3) of the Revised Rules of this Court, consent to the filing of this brief was requested of the parties but was refused.

Interest of Amicus Curiae

The American Bar Association ("ABA") is a voluntary bar association whose membership is open to the members of the bars of the States, territories and possessions of the United States. It is the largest organization of the legal profession in the United States, having more than 230,000 members.

The ABA, through its various Sections, has a substantial and continuing interest in the systematic development of national labor law and policy as well as of securities law and policy. ABA members have had the primary responsibility for advising private citizens, corporations, employers, employees, labor organizations, and others as to their rights and obligations with respect to private pension plans. The Section of Labor Relations Law has been particularly involved with such matters over the years.

The Council of the ABA Labor Relations Law Section has recently adopted the following resolution:

> Resolved, that it is the practical judgment of the members of the Council that expanded application of the antifraud provisions of the federal securities laws to employee benefit plans would cause a substantial disruption of plan administration and is not needed to protect the interests of the plans and of their participants and beneficiaries.

Accordingly, permission is sought to submit the attached brief.

June 19, 1978

Respectfully submitted,

William B. Spann, Jr.
1155 East 60th Street
Chicago, Illinois 60637
President, American Bar Association

Frank Cummings
Jeffrey Newman
Marshall, Bratter, Greene, Allison & Tucker
1140 Connecticut Avenue, N.W.
Washington, D.C. 20036
and
430 Park Avenue
New York, New York 10022
Attorneys for Amicus Curiae, American Bar Association

Of Counsel:

Jay S. Siegel
60 Washington Street
Hartford, Connecticut 06106
Chairman, Section of Labor Relations Law

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WILLIAM B. SPANN, JR.
1155 East 60th Street
Chicago, Illinois 60637
President, American Bar Association

FRANK CUMMINGS
JEFFREY NEWMAN
Marshall, Bratter, Greene, Allison & Tucker
1140 Connecticut Avenue, N.W.
Washington, D.C. 20036
and
430 Park Avenue
New York, New York 10022
Attorneys for Amicus Curiae, American Bar Association

Of Counsel:
JAY S. SIEGEL
60 Washington Street
Hartford, Connecticut 06106
Chairman, Section of Labor Relations Law

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SUMMARY OF ARGUMENT

The Claim

Respondent John Daniel worked 22½ years for various employers who had bargained collectively with his union, Local 705 of the International Brotherhood of Teamsters,

Chauffeurs, Warehousemen and Helpers of America. Eventually included in the compensation structure negotiated by Local 705 and embracing respondent was a pension plan (the "Plan") into which each such employer made fixed contributions. After nine years of employment, respondent underwent a four-month break in service. Under the terms of the Plan, he thereby failed to accrue a vested pension. In the case at bar, respondent alleges that representations and omissions misled him into believing that he had vested under the Plan. On these facts, he asserts (among other things) a right to recovery under the anti-fraud provisions of the Securities Act of 1933, 15 U.S.C. § 77a *et seq.* (the "1933 Act"), and the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.* (the "1934 Act").

ABA Position

The American Bar Association ("ABA") contends that the securities claims alleged in the Complaint should be dismissed and that the decision of the Court of Appeals herein should be reversed.

The "economic reality," the controlling factor under the *Forman* decision, is that a working man who accepts and continues employment and whose compensation package includes participation in a compulsory, non-contributory pension plan, has not thereby purchased a security within the meaning of the 1933 and 1934 Acts. A pension is not a "security"; it defies credibility to contend that by taking a job and keeping it, a worker has made an investment decision. Similar considerations show that coverage under an involuntary pension plan to which the worker has made no contribution involves no securities "sale."

Additionally, the Court of Appeals' holding is inconsistent with the pattern of existing federal regulation.

Congress has historically dealt separately with labor problems. As to pension matters in particular, it has regulated comprehensively through the Employee Retirement Income Security Act of 1974 ("ERISA"), in which Congress embodied its decision not to impose retroactive liability for previous practices and evidenced its assumption that the federal securities laws did not apply.

Finally, the serious adverse practical consequences that would flow from an affirmance herein, properly considered after *Blue Chip,* preclude creation of a private right of action under the securities laws in the circumstances of this case. If the rule asserted by the Court of Appeals were affirmed, an undue financial burden would be imposed on the pension plan system and its beneficiaries. The disclosure rule mandated by the lower court cannot feasibly be implemented in the labor-management context. Such factors would provide an incentive for employers to further abandon the idea of the pension plan.

ARGUMENT

Introduction

Respondent argues, in essence, that the federal securities laws are applicable because he failed to learn, at the time of "sale," of certain facts and rights pertinent to his "investment."

Such argument overlooks the reality that the learning process in employment relations is a unique phenomenon, one that has been characterized by this Court as a gradual absorption of customs and practices—applied within the framework of a separate "government," cultivated under federal labor law:

> 'Persons unfamiliar with mills and factories—farmers or professors, for example—often remark upon visiting them that they seem like another world. This is particularly true if, as in the steel industry, both tradition and technology have strongly and uniquely molded the ways men think and act when at work. The newly hired employee, the "green hand," is gradually initiated into what amounts to a miniature society. There he finds himself in a strange environment that assaults his senses with unusual sounds and smells and often has different "weather conditions" such as sudden drafts of heat, cold or humidity. He discovers that the society of which he only gradually becomes a part has of course a formal government of its own—the rules which management and the union have laid down—but that it also differs from or parallels the world outside in social classes, folklore, ritual, and traditions.' *United Steelworkers* v. *Enterprise Wheel and Car Corp.*, 363 U.S. 593, 596 n.2, quoting Walker, *Life in the Automatic Factory*, 36 Harv. Bus. Rev. 111, 117.

In assessing the merits of respondent's securities law argument, the Court should and no doubt will give due weight to the distinctive nature of the labor environment in which it is asserted.

I.

THE ECONOMIC REALITY IS THAT A WORKMAN WHO ACCEPTS AND CONTINUES EMPLOYMENT —AND WHOSE COMPENSATION PACKAGE INCLUDES PARTICIPATION IN A COMPULSORY, NON-CONTRIBUTORY PENSION PLAN—HAS NOT THEREBY PURCHASED A SECURITY WITHIN THE MEANING OF THE 1933 AND 1934 ACTS.

Respondent, the Securities and Exchange Commission ("SEC"), and the courts below have constructed an argument that when an employee accepts and remains on a job where benefits include participation in a compulsory, non-contributory pension plan, he has thereby acquired, in a "sale," a "security" within the meaning of the federal securities laws.

Such an argument necessarily brings to mind a venerable canon of construction: The risk of misunderstanding increases if the focus is on the literal at the expense of the substantive. St. Paul's admonition that "the letter killeth, but the spirit giveth life," 2 Corinthians 3:6, has not been lost on this Court, which recently reiterated a traditional principle of statutory interpretation:

> '[A] thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.' *Church of the Holy Trinity* v. *United States*, 143 U.S. 457, 459 (1892).

United Housing Foundation, Inc. v. *Forman*, 421 U.S. 837, 849.

A fair application of this principle to the question before the Court necessarily precludes, we submit, the conclusion

that the federal securities laws are brought into play when a worker takes a job and keeps it.

We approach the securities issue herein not by an exhaustive analysis of every case in which the courts have determined the scope of the terms "security" or "sale." Instead, the essence of our argument is that the "economic reality" of involuntary, non-contributory pensions is a labor reality, not an investment reality, and that this Court's most pertinent precedents underscore the significance of such a difference.

A. A Pension Is Not a "Security": It Defies Economic Reality To Contend That By Accepting and Continuing in Employment, a Worker Has Made an Investment Decision.

United Housing Foundation, Inc. v. *Forman,* 421 U.S. 837, was, of course, a securities-law case. It reiterated the truth that for purposes of defining a "security" within the meaning of § 2(1) of the 1933 Act, 15 U.S.C. §77b(1), and § 3(a)(10) of the 1934 Act, 15 U.S.C. § 78c(a)(10), form should be disregarded in favor of substance; that is, the focus must be upon the "economic realit[y] of the transaction . . . ." 421 U.S. at 852.[1] This "context over text" approach, *FBS Financial, Inc.* v. *CleveTrust Realty Investors,* Fed. Sec. L. Rep. (CCH) ¶96,341, at 93,154 (N.D. Ohio 1977), should be dispositive in the case at bar. For in economic reality, the expectation of a worker as to his pension plan—to the extent that he has an expectation—is that of a wage earner, not an investor.

The court below deemed respondent's participation in the pension plan an "investment contract"—and therefore a

1. Preceding the statutory definitions of both "security" and "sale" in the 1933 and 1934 Acts is the same cautionary prescription: ". . . unless the context otherwise requires. . . ." *Compare* § 2 of the 1933 Act, 15 U.S.C. § 77b, *with* § 3(a) of the 1934 Act, 15 U.S.C. § 78c(a).

"security"—under sections 2(1) and 3(a)(10) of the 1933 and 1934 Acts, respectively. (221a-222a)[2] The touchstone of that conclusion was the Court of Appeals' determination that respondent's interest in the Teamsters' pension plan satisfied this Court's classic definition of an investment contract:

> [A] contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party . . . .

SEC v. *W. J. Howey Co.,* 328 U.S. 293, 298-99.

Indisputable realities suggest otherwise. It seems surely doubtful that a worker beginning his career has any significant expectations at all regarding pension benefits; far more likely is such an employee to focus on such considerations as wage levels, working conditions, the nature of the job, the opportunity for advancement and training, and medical and vacation benefits. *See* D. Alef and G. Short, *Problems Created by CA-7 Decision that Pension Plan Participation is a Security,* 47 The Journal of Taxation 282, 284 (November 1977) [hereinafter cited as *Alef and Short*].[3] To the extent, however, that a worker does have specific expectations regarding a pension, he is properly inclined to look upon such benefits more as deferred compensation for his services than as economic "profits" to be reaped on account of the investment skills of others. *See A Report to the [ABA] Committee on Federal Regulation of Securities from the Study Group of 1933 Act—General Subcommittee on Daniel, et al.* v. *International Brotherhood of Teamsters,* 32 Bus. Law. 1925, 1936 (1977) [hereinafter cited as *ABA*

2. Parenthetical citations ending in "a" refer to the appendix in this Court.

3. Respondent Daniel did not himself even learn of the Plan at issue until five years after he began his employment (214a).

General Subcommittee Report]. Such expectations of deferred compensation comport with the reality by which such pension benefits are secured: through negotiation by employee representatives as part of a total wage package. *See ABA General Subcommittee Report* 1938.

These perceptions are reinforced, moreover, by pertinent congressional understandings that pension benefits do indeed resemble deferred compensation. Thus, the Senate Committee Report that preceded the 1958 passage of the first federal pension legislation, the Welfare and Pension Plans Disclosure Act, P.L. 85-836, concluded:

> Regardless of the form they take, the employer's share of the cost of these plans or the benefits the employers provide are a form of *compensation*.

S. Rep. No. 1440, 85th Cong., 2d Sess. 3, 4 (1958) (emphasis added). Similarly, the Senate Committee Report that preceded the 1974 passage of ERISA confronted the history of pension abuse and asked whether workers could fairly "be denied benefits they have earned as deferred compensation." S. Rep. No. 93-127, 93d Cong., 1st Sess. 9 (1973). In the same vein, the House Committee Report on ERISA observed: "The Act presumes that promised pension benefits are in the form of a conditional deferred wage." H.R. Rep. No. 93-533, 93d Cong., 1st Sess. 13 (1973). Indeed, the portion of the Internal Revenue Code amended to regulate pension plans in conjunction with ERISA is entitled "Deferred Compensation, Etc." I.R.C. Subtitle A, Ch. 1, Subch. D.

That pension benefits are in fact in the nature of deferred compensation, not investment profits, is exemplified most clearly—and the Court of Appeals' misconception stands out most sharply—in that type of plan brought by respondent Daniel to the Court: a defined benefit plan. In such

a plan, the participant enjoys specified benefits, normally payable on retirement, in accordance with a pre-determined, mutually agreed upon benefit schedule, ordinarily fixed in proportion to the amount of time spent on the job. He expects and is entitled to these specified benefits without regard to either the amount contributed by the employer or any gain realized through investment or other employees' forfeitures. *See Alef and Short* 283.[4]

None of this is to denigrate the importance that pension benefits assume, at least at some point, in the minds of workers generally. Because of that importance and because of a national sensitivity to the matter, pensions are of course comprehensively regulated through ERISA (discussed at Point IIB, *infra*). To conclude, however, that workers could or do look upon pension benefits as investment returns, as opposed to deferred compensation for their labor, is to premise a legal construct upon an empirical fiction—a well-intended fiction, presumably, but a fiction nonetheless.[5]

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4. The type of plan at issue here is the one most clearly within the labor relations context: a defined benefit, collectively bargained, non-contributory plan in which membership is involuntary and which does not involve employee investment in employer securities.

5. In light of the "economic realities" that here govern, it seems hardly surprising that most of the courts that have considered the issue have rejected the securities' law analysis embraced by the Court of Appeals. *See Robinson* v. *United Mine Workers of America Health and Retirement Funds,* 435 F. Supp. 245 (D.D.C. 1977); *Weins* v. *International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America,* [1977-78] Fed. Sec. L. Rep. (CCH) ¶ 96,005 (C.D. Calif. 1977); *Hurn* v. *Retirement Fund Trust of the Plumbing, Heating and Piping Industry of Southern California,* 424 F. Supp. 80 (C.D. Calif. 1976); *but see Schlansky* v. *United Merchants and Manufacturers, Inc.,* 443 F. Supp. 1054 (S.D.N.Y. 1977).

B. Similar Considerations Show That Working Under a Compulsory, Non-Contributory Pension Plan Involves No "Sale".

Insofar as the court below was prepared to find a securities "sale" without volition by the employee (244a), such conclusion seems flatly inconsistent with the undisputed central purpose of the securities laws: the protection of the investor. Thus, while "in certain instances investors who became 'forced' buyers or sellers have been deemed to fall within the class for which the statutes were enacted [citations omitted], there is no evidence that the definition was intended to be stretched to include persons who had no intent to be, or no knowledge that they were, investors." *Adato* v. *Kagan*, [1977-78] Fed. Sec. L. Rep. (CCH) ¶ 96,-241 at 92,622-23 (S.D.N.Y.), *appeal docketed*, No. 77 Civ. 7620 (2d Cir. Dec. 20, 1977).[6]

Conversely, to the extent that the court below discerned volition by participants in an involuntary pension plan (244a), that court again appears to have bottomed its conclusion upon dubious premises.[7] For the reality appears that, both in law and in fact, employees do not make investment decisions regarding pension benefits. Where a union is their statutory representative, employees cannot make *any* decision regarding the nature and amount of compensation, including pension benefits; such matters may only be negotiated by the union, which is the exclusive statutory bargaining representative. Labor-Management Relations Act § 9(a), 29 U.S.C. § 159(a); *J.I. Case Co.* v. *NLRB*, 321 U.S. 332.

The Court of Appeals' alternative conclusion (244a)—that by ratifying the collective bargaining agreement workers evidence volition in an investment decision as to pension benefits—seems equally at odds with economic reality. For one thing, there may or may not be a ratification vote. For another thing, such votes, when they do occur, are referenda (often by voice vote) on the aggregate compensation package, not on the individual components. *See ABA General Subcommittee Report* 1941. Under such circumstances, to infer a conscious choice by all employees to participate in a compulsory pension plan—i.e., a plan where no employee may opt out—is, we contend, to misapprehend reality. *See* B. Nimkin, *The Daniel Case,* 11 The

6. And, of course, until the filing of its *amicus* brief with the Seventh Circuit in this case, the SEC had historically taken the position that "no sale" occurred upon a worker's entry into an involuntary, non-contributory plan. Opinion of Assistant General Counsel of the Commission [1941-44] Fed. Sec. L. Rep. (CCH) ¶ 75,195 at 75,386 (1941). The SEC did so because it properly understood that in such a plan, "there is no element of volition on the part of employees whether or not to participate and make contributions." *Id.* To reverse its position on such a critical point is, of course, the SEC's prerogative. To reverse its position and simultaneously claim the considerable weight that would otherwise be accorded an administrative agency is not. *United Housing Foundation, Inc.* v. *Forman*, *supra*, 421 U.S. at 858-9 n.25. Under such circumstances, the SEC's views are entitled to "no special weight". *Id.* Neither, of course, should the agency's views be adopted when its reasoning is unpersuasive and its construction exceeds the scope of the governing statute. *SEC* v. *Sloan*, 46 U.S.L.W. 4426, 4430 (U.S. May 15, 1978).

7. Respondent and the SEC argued in the court below that Congress in 1934 considered a statutory exemption of pension plans, that the Senate passed such an amendment, but that the conferees deleted it from the 1934 Act as passed. But the testimony of Commissioner Purcell and his express recollection of that history (which corresponds to the language of the conference report) makes it clear that the reason for the deletion was the 1934 conferees' concern that securities regulation might be appropriate for "employees' stock investment plans." As to these plans, in which contributions are voluntary and employers' securities are purchased, different considerations may well apply. *See Hearings Before the House Committee on Interstate and Foreign Commerce*, 77th Cong., 1st Sess. 895-96 (1941); H.R. Rep. No. 1838, 73d Cong., 2d Sess. 41 (1934).

Review of Securities Regulation 963, 965 n.10 (Feb. 28, 1978) [hereinafter cited as *Nimkin*].

In sum, the "economic reality" of pension accrual is admittedly unique. Clearly, however, pension benefits are properly perceived more as compensation for labor performed than as investment profits generated by the entrepreneurial skills of others. And a laborer presented with participation in an involuntary pension plan cannot plausibly be said to have made an investment decision. Accordingly, the "sale" of a "security" cannot fairly be discerned, we submit, when a worker takes and keeps a job.[8]

II.

THE COURT OF APPEALS' HOLDING IS INCONSISTENT WITH EXISTING FEDERAL REGULATION, WHICH DEALS SEPARATELY WITH PENSION RIGHTS AND EVIDENCES CONGRESSIONAL UNDERSTANDING THAT THE SECURITIES LAWS DO NOT APPLY.

A. Congress Has Historically Regulated Labor Problems Separately.

Insofar as the Court of Appeals applied the law of the marketplace—for that is classically the province of the federal securities laws—to the sphere of employment relations, it impermissibly blurred a distinction repeatedly drawn by the Congress and respected by this Court.

8. Insofar as the SEC has urged otherwise, its position may fairly be seen as the latest in a series of recent instances where the agency has put forth a legal interpretation not properly cognizable under the federal securities laws. *See, e.g., SEC* v. *Sloan, supra,* 46 U.S.L.W. at 4431 (Brennan, J., concurring); *Piper* v. *Chris-Craft Industries, Inc.,* 430 U.S. 1, 41 n.27; *Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185, 206-08; *United Housing Foundation, Inc.* v. *Forman, supra,* 421 U.S. at 858-9 n.25; *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723, 738-9; *cf., Foremost-McKesson, Inc.* v. *Provident Securities Co.,* 423 U.S. 232, 259.

To cite but a few representative examples of congressional design to deal separately with labor problems: The law of labor-management negotiations generally is not the law of sales, but rather is the National Labor Relations Act, Ch. 7 Sub. Ch. II, 29 U.S.C. §§ 151-68, administered by the National Labor Relations Board. The law governing relations between unions and their members is not that pertaining to private associations and corporations, but rather is the Labor Management Reporting and Disclosure Act, 29 U.S.C. §§ 401-531, administered by the Labor Department. As to contracts, commercial arbitration law is displaced, under the Labor-Management Relations Act § 301, 29 U.S.C. § 185, by federal labor law and the "common law of the shop." *United Steelworkers* v. *Warrior & Gulf Nav. Co.,* 363 U.S. 574, 580; *Textile Workers* v. *Lincoln Mills,* 353 U.S. 448. Tort law in the marketplace is that of negligence, but is universally replaced by workers' compensation in the workplace. *See Cudahy Packing Co. of Nebraska* v. *Parramore,* 263 U.S. 418. Ordinary rules of antitrust are replaced by special secondary boycott rules under § 8(b)(4) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4), administered by the National Labor Relations Board. Safety standards mandated for purchasers under the Consumer Product Safety Act, 15 U.S.C. §§ 2051-81, are fixed separately for workers—by the Occupational Safety and Health Act, 29 U.S.C. §§ 651-78, administered by the Labor Department. The federal courts' power to grant injunctions is tempered by separate labor standards prescribed by the Norris-LaGuardia Act §§ 1-15, 29 U.S.C. §§ 101-15.

And, of course, the very subject at issue, pension accrual, is regulated through the separate and comprehensive legislation that is ERISA, discussed below.

In brief, the pervasive congressional design has been to acknowledge and preserve the *sui generis* nature of the workplace. That design will no doubt be respected by this Court in judging the lower court's holding that the Congress that regulated the securities market—through the 1933 Securities Act and the 1934 Securities Exchange Act—thereby intended to regulate the labor market.

B. Congress Has Regulated Pension Problems Comprehensively Under ERISA Without Imposing Retroactive Liability and Has Evidenced Its Understanding that the Securities Laws Did Not Apply.

The pension reform movement that culminated in the 1974 enactment of ERISA evidences three legislative elements that bear significantly on the resolution of the case at bar: 1) the comprehensive regulation of the pension system itself, including a prohibition of the particular practices on account of which respondent failed to vest; 2) a judgment not to impose retroactive liability for previous practices; and 3) Congress' understanding that the federal securities laws had no application to the pension field. Singly and together, these factors militate in favor of reversing the lower court's holding.

1. *ERISA Provides Comprehensive Regulation of Pension Plans.*

ERISA regulates every aspect of pension plan design and administration. Had respondent worked under a plan qualified since ERISA, he could not have failed to vest for the reasons that he did.

The principal features of ERISA include the following:

—Vesting must occur within 10 years, or on comparably favorable schedules, § 203(a)(2)(A), 29 U.S.C. § 1053(a)(2)(A); *see also* I.R.C. § 411(a)(2);[9]

—short breaks in service may generally not result in loss of vesting, § 203(b)(3), 29 U.S.C. § 1053(b)(3); *see also* I.R.C. § 411(a)(6);[9]

—employees must receive a description that summarizes the plan (including "the circumstances which may result in disqualification"), § 102(b), 29 U.S.C. § 1022(b), and is written in language "calculated to be understood by the average plan participant," § 102(a)(1), 29 U.S.C. § 1022(a)(1);

—pension trust funds must be managed under a new federal prudence standard, § 404, 29 U.S.C. § 1104;

—contributions must be made on a new federal funding schedule, § 302, 29 U.S.C. § 1082; *see also* I.R.C. § 412;

—employees must be shown, upon request, a copy of the annual report, § 104(b)(2), 29 U.S.C. § 1024(b)(2), which must include an actuarial statement, § 103(a)(1)(B)(ii), 29 U.S.C. § 1023(a)(1)(B)(ii), disclosing "actuarial assumptions and methods used to determine costs," § 103(d)(3), 29 U.S.C. § 1023(d)(3); and

—annually, on request, employees are entitled to a written statement of their accrued and nonforfeitable pension benefits, § 105, 29 U.S.C. § 1025.

Such comprehensive regulation of the pension field—mandating elaborate standards for disclosure, vesting, funding, and fiduciary conduct—would almost surely never have been enacted had Congress assumed that the federal

9. In light of these provisions and of respondent's length of service (22½ years) and break-in-service (four months), Mr. Daniel would have vested under an ERISA-qualified pension.

securities laws already applied. Under the circumstances, an earlier teaching of the Court is instructive: "Courts may properly take into account the later [a]ct when asked to extend the reach of the earlier [a]ct's vague language to the limits which, read literally, the words might permit." *NLRB* v. *Drivers, Chauffeurs, Helpers, Local Union No. 639*, 362 U.S. 274, 291-92.

2. *Congress Chose Not To Impose Retroactive Liability for Past Pension Practices.*

The practical effect of the Court of Appeals' holding would be to circumvent an unambiguous congressional judgment not to impose retroactive liability for previous pension practices. That judgment was embodied in ERISA, which not only did not provide for redress of past wrongs; it specifically mandated a three-year delay in general effectiveness. Such delay was necessary, Congress decided, "to provide sufficient time for pension and profit-sharing retirement plans to adjust to the new vesting and funding standards, to make provision for additional costs which may be experienced, and to permit negotiated agreements to transpire [*sic*]." S. Rep. No. 93-127, 93d Cong., 1st Sess. 36 (1973).

As to why Congress chose not to impose liability for pre-ERISA conduct, Senator Williams, Chairman of the Labor & Public Welfare Committee, later explained:

> In considering these 'minimum standards,' Congress dealt carefully with the subject of break-in-service rules and, while setting a prospective standard, deliberately did not make retroactive changes, recognizing that the sudden imposition of costs relating to funding periods already passed would simply be prohibitive for plan sponsors.

Oversight of ERISA, 1977, Hearings Before the Subcommittee on Labor, Committee on Human Resources, U.S. Senate, 95th Cong., 1st Sess. 129 (1977).

This Court has recently acknowledged the legislative design in this respect, noting that "[i]n 1974, Congress underlined the importance of making only gradual and prospective changes in the rules that govern pension plans." *City of Los Angeles* v. *Manhart*, 46 U.S.L.W. 4347, 4352 n.40 (U.S. Apr. 25, 1978). Observing that ERISA had "paid careful attention to the problem of retroactivity," *id.*, the Court concluded that "the rules that apply to [pension and insurance] funds should not be applied retroactively unless the legislature has plainly commanded that result." *Id.* at 4352.

Insofar as the Court of Appeals' holding would necessarily impose retroactive liability where Congress and this Court have directed otherwise, that holding seems especially unwarranted.

3. *Legislative History Shows a Congressional Understanding that Federal Securities Law Did Not Apply.*

In enacting ERISA, Congress specifically found that "owing to the lack of employee information . . . it is desirable in the interests of the employees and their beneficiaries . . . that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans. . . ." § 2(a), 29 U.S.C. § 1001(a). Substantially the same finding appears in the Welfare and Pension Plans Disclosure Act ("WPPDA"), P.L. 85-836, as amended, § 2a, 16 years earlier. Both findings evidence congressional understanding that the federal securities laws did not address the problem of a worker and his pension.

Significantly, these findings—and the inherent legislative understanding they reflect—followed repeated instances where the SEC had disavowed securities law jurisdiction over the field. Thus, in 1957 testimony that preceded the passage of WPPDA, the SEC Chairman had acknowledged that the proposed pension bill lay outside the securities perimeter:

> The functions of the Securities and Exchange Commission are devoted to the regulation of the capital securities markets. . . . But the area covered by a bill on welfare and pension funds does not, as such, deal with the capital securities markets.

Hearings Before the Subcommittee on Welfare and Pension Plans Legislation, Committee on Labor and Public Welfare, U.S. Senate, 85th Cong., 1st Sess. 107 (1957).[10]

One year later, as WPPDA neared enactment, SEC representatives told the House Special Subcommittee on Welfare and Pension Plans that "they did not feel that they were the proper agency to handle the administration of this type of legislation. . . ." H. R. Rep. No. 2283, 85th Cong., 2d Sess. 1-8 (1958); *see* U.S. Department of Labor, *Legislative History of the Welfare and Pension Plans Disclosure Act of 1958, as Amended by Public Law 87-420* 77 (1962).

And in 1962, the SEC again resisted the prospect of administering pension and welfare plan legislation. Chairman Cary, in a letter to Senator McNamara of the Labor and Public Welfare Committee, acknowledged that such plans "are the fruits of collective bargaining [and] are inseparably intertwined with labor-management relations,"

10. The relevant legislative history is set forth and analyzed in detail in *Oversight of ERISA, 1977, Hearings Before the Subcommittee on Labor, Committee on Human Resources, U.S. Senate,* 95th Cong., 1st Sess. 777 and generally at 106-45, 776-801 (1977).

an area in which "this agency does not possess expertise. . . ." Daily Cong. Rec. 1756-59, Senate, February 7, 1962; U.S. Department of Labor, *Legislative History of the Welfare and Pension Plans Disclosure Act of 1958, as Amended by Public Law 87-420* 231-32 (1962).

Against this backdrop, the Senate Committee that was to spearhead the passage of ERISA understandably deemed pension plans generally "exempt from coverage under the Securities Act of 1933. . . ." S. Rep. No. 92-634, 92d Cong., 2d Sess. 96 (1972).[11]

Accordingly, the 1974 enactment of ERISA seems clearly to have evidenced and followed upon a consistent congressional understanding that the federal securities law had no general application to the pension sphere. Senator Williams, ERISA's principal architect, has recently reaffirmed as much.[12] This Court should do likewise—and should reject a securities law interpretation itself at odds with the legislative assumptions that underlay modern pension reform.

11. The Committee did properly understand coverage to extend to that type of pension plan not before the Court: a voluntary plan whereby employer security purchases exceed employer contributions. *Id.*

12. Senator Williams has declared:

> Congress carefully tailored that [ERISA] disclosure to meet its national policy objectives. . . . [I]t did not conceive that satisfactory disclosure under ERISA might merely be the trigger for further disclosure to meet the case-by-case standard of the antifraud provisions of the Securities Acts.

Oversight of ERISA, 1977, Hearings Before the Subcommittee on Labor, Committee on Human Resources, U.S. Senate, 95th Cong., 1st Sess. 135 (1977).

III.

SERIOUS ADVERSE PRACTICAL CONSEQUENCES PRECLUDE CREATION OF A PRIVATE RIGHT OF ACTION UNDER THE SECURITIES LAWS IN THESE CIRCUMSTANCES.

In determining the scope of private claims under the securities laws, policy factors are properly assessed. The Court acknowledged in *Blue Chip Stamps* v. *Manor Drug Stores* that since Rule 10b-5 gives rise to a "private cause of action which has been judicially found to exist," 421 U.S. 723, 749, it would be "disingenuous to suggest that either Congress in 1934 or the Securities and Exchange Commission in 1942 foreordained the present rule of the law. . . ." *Id.* at 737. "It is therefore proper," said the Court, "that we consider . . . what may be described as policy considerations when we come to flesh out the portions of the law with respect to which neither the congressional enactment nor the administrative regulations offer conclusive guidance." *Id.*

In refusing to recognize the expanded right of action contended for in *Blue Chip,* the Court reviewed such policy considerations as the risk of "strike suits," *id.* at 741-3, the potential for unbridled perjury upon the trial of "hazy issues of historical fact the proof of which depended almost entirely on oral testimony," *id.* at 743, the scope of potential liability "in an indeterminate amount for an indeterminate time to an indeterminate class," *id.* at 748, and other "practical factors" which "are entitled to a good deal of weight." *Id.* at 749.

Such factors in this case—where respondent must rely on a literalistic interpretation of the securities laws to suggest their applicability—militate against discerning a private right of action in the circumstances here presented.

A. The Rule Adopted by the Court of Appeals Would Inflict an Undue Financial Burden on the Private Pension System.

Respondent, opposing *amici* and the court below have contended that the financial impact of the rule adopted would be "limited" (259a), the occasional result of rectifying an aberrational fraud. In fact, the practical consequence of the Court of Appeals' holding, which has been properly characterized as a "sudden, giant extension of the reach of the federal securities laws," *Nimkin* 964, would be to pose a widespread financial threat to the private pension system—to the industry that funds and administers the system, to the innocent millions who depend on its solvency.

For an affirmance herein would at once empower millions of would-be pensioners who never vested—and whose plight ultimately prompted the passage of ERISA—to state nondismissible claims under the federal securities laws. These newly enfranchised litigants could presumably offer juries testimony of conversations that may (or may not) have taken place years earlier with union business agents, hiring hall representatives and personnel officials—few of whom, if available at all, would be prepared to refute individual plaintiff's accounts of long forgotten encounters. Under the circumstances, the prospect for perjury seems powerful; the incentive to settle—and to pay substantial sums in the process—would be irresistible.

As to the dollar cost of such newly created liability, two results seem inevitable: First, the cost would be unacceptably large;[13] and second, such cost would be imposed on a

13. A recent study commissioned by the Department of Labor estimates potential liability to all plans at between $23.8 billion and $39.6 billion. 185 Bureau of National Affairs Pension Reporter R-11-R-12 (Apr. 24, 1978). The study was prepared for George B. Buck Consulting Actuaries, Inc. by Donald S. Grubbs, Jr., F.S.A., formerly chief actuary to the Internal Revenue Service and consultant to the Senate Labor and Public Welfare Committee during consideration of the legislation that became ERISA. *See* S. Rep. No. 93-127, 93d Cong., 1st Sess. 73 Appendix (1973).

pension plan system that may not be able to pay for benefits already earned; a congressional finding that preceded ERISA was that "plans may not have sufficient assets to discharge the accrued benefits and liabilities. . . ." S. Rep. No. 92-634, 92d Cong., 2d Sess. 71 (1972).

It seems equally inevitable that the ultimate bearers of such cost, however large it would eventually prove, would be the countless number of innocent persons currently dependent on existing pensions.

B. The Implementation of the Disclosure Rule Mandated by the Court of Appeals Is Not Feasible in the Labor-Management Context.

The Court of Appeals has mandated disclosure of information that is feasible neither to collect nor to disseminate.

Representative in this respect is the lower court's insistence (216a) that a plan sponsor "disclose the actuarial probability . . . that a member actually will receive pension benefits. . . ." The Court of Appeals explicitly assumed (258a) that such disclosure would be simple to effect, since the actuaries "needed all of the information in order to set up the plan in the first place."

In fact, actuarial turnover assumptions may never have been made at all; annual contributions for most plans are in practice calculated by reference to but a single variable: interest. American Academy of Actuaries, *Enrolled Actuaries Report,* Vol. 3, No. 4, 1 (Apr. 1978). More fundamentally, such turnover assumptions as are made necessarily speak to the average of a statistically diverse pool of plan participants; for any particular employee, the turnover rate derived from the aggregate average would almost surely prove misleading.

Finally, it seems impractical that disclosure be made in the way and at the time mandated by the lower court's

securities law analysis. For the analysis that views this as "any other securities fraud case," (259a) necessarily calls for disclosure at or before the time of "sale." Yet a sale said to occur when a person "acquire[s] an interest in a pension fund," i.e., "at inception [hiring], or during subsequent ratifications or upon a job offer" (254a-255a), presents obvious and profound disclosure problems. Simply put, it is difficult to envision a well-intended but overburdened and unlettered hiring hall representative (or union business agent or personnel clerk) making meaningful disclosure of the panoply of information that underlies a pension plan—including such diverse factors as actuarial assumptions, investment policy, funding programs, eligibility, accrual, vesting, breaks in service, joint and survivor annuities, and social security offsets. It was in light of such pragmatic considerations that Congress specified, under ERISA, that which is to be disclosed regarding pensions and directed the more realistic timetable and manner by which such disclosure is to be made. *See* Point IIB, *supra.*

C. Given These Practical Problems, There Would be Strong Incentive for Employers To Abandon Pension Plans.

Recent congressional hearings have focused on a disturbing increase in pension plan terminations, effected in the wake of new ERISA requirements. In 1975, 4,000 defined benefit plans terminated, while in 1976, 7,300 such plans terminated. *Oversight of ERISA, 1977, Hearings before the Subcommittee on Labor, Committee on Human Resources, U.S. Senate,* 95th Cong., 1st Sess. 59 (1977). The IRS, after a preliminary survey, concluded that "possibly 30 percent of the Nation's 500,000 private pension plans may have or will terminate." *Id.* at 60.

Whatever the precise validity of this prediction, it seems self-evident that on top of massive federal pension legislation still not fully implemented, the addition of retroactive liability based on securities laws never previously thought applicable could only accelerate the termination process.

Such a prospect would be sobering in any event; this is but the latest in a series of hard cases that threaten to make bad law. It is all the more unacceptable given that respondent need not have an affirmance to vindicate his personal plight; Mr. Daniel may and presumably will litigate vigorously his pending non-securities claims—under theories of common law fraud, of breach of fiduciary duty (National Labor Relations Act), and of breach of trust (Labor-Management Relations Act).

CONCLUSION

On the basis of the foregoing analysis, we respectfully urge this Court to find that under the circumstances here presented, there has been no "sale" of a "security" within the meaning of the federal securities laws, and, accordingly, we urge that the decision of the Court of Appeals be reversed.

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Respectfully submitted,

William B. Spann, Jr.
1155 East 60th Street
Chicago, Illinois 60637
President, American Bar Association

Frank Cummings
Jeffrey Newman
Marshall, Bratter, Greene, Allison & Tucker
1140 Connecticut Avenue, N.W.
Washington, D.C. 20036
and
430 Park Avenue
New York, New York 10022
Attorneys for Amicus Curiae, American Bar Association

Of Counsel:

Jay S. Siegel
60 Washington Street
Hartford, Connecticut 06106
Chairman, Section of Labor Relations Law